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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JAMES JAROLD CARIGLIO,** **Defendant and Appellant.**	**A121303** **(Solano County Super. Ct. Nos. FCR235651, FCR229481)**

In case No. FCR235651, a jury convicted defendant James Jarold Cariglio (appellant) of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)). After appellant's motion for a new trial was denied, he was sentenced to six years in state prison with credit for time served of 680 days. Appellant filed a timely appeal.[1]

Appellant contends the trial court erred in excluding third party culpability evidence and denying his motion for a new trial. Appellant further argues his trial counsel's failure to prepare and present third party culpability evidence deprived him of

[1] In case No. FCR229481, appellant pleaded no contest to theft from the person (Pen. Code, § 487, subd. (c)) and was sentenced to a concurrent two-year midterm. Appellant filed a timely appeal challenging the award of conduct credits. Subsequent to this appeal, the trial court issued an amended abstract reflecting omitted credits. The sole issue raised on appeal in this case, therefore, has been resolved.

effective assistance of counsel. We reject appellant's contentions and affirm the judgment.

BACKGROUND

In the evening of August 19, 2006, Mary G. (Mother) took her then 11-year-old son (Victim) from his father's house, where Victim lived, to her house so Victim could spend the night with her. At the time, Mother rented a room in a home where several other people lived, and had been residing there for less than one month. When Victim and Mother arrived at the house, several people were gathered outside and in the garage. Victim met many of the people who were at the house, including appellant and B.L., the house manager.[2] Mother knew appellant, as he was friends with some of the residents and had frequently visited the house. That evening, Victim talked with appellant while playing outside the residence.

Sometime between 10:00 and 11:00 p.m. Mother took Victim into her room so he could watch television while in bed. Mother turned on the television and stayed for about five or 10 minutes before leaving the room. Mother left the door to her room open and went approximately 14 feet away to the kitchen area, which was in the center of the house, to put together a cabinet. From where she worked, Mother could see the big round chair that was next to her bed.

At some point after Victim went to bed, appellant asked Mother if he could watch television in her room. She told appellant that he could, but he was not to wake Victim. Mother saw appellant enter the room and sit in the chair that was near the bed. During the time appellant was in the room Mother could see him as she worked in the kitchen area.

There are discrepancies in the evidence as to when appellant entered the room to watch television. At trial, Mother testified it was still dark outside though she could not recall what time appellant entered the room. In the days after the molestation occurred,

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[2] Documents relating to a prior out-of-state conviction suffered by B.L. were filed under seal in the trial court and in this court. To maintain the confidentiality of the information contained in those documents we refer to the house manager by his initials.

however, she told Fairfield Police Officer Wilkie that appellant entered the bedroom around 1:00 or 2:00 a.m. Victim first testified that appellant entered the room approximately three minutes after Mother put Victim to bed, making appellant's entry between 10:15 and 11:15 p.m. In contrast, shortly after the molestation, Victim told Wilkie that he had been awake for awhile when appellant entered the room at around sunrise. When reminded of his earlier account, Victim testified that when appellant entered it was getting light and the sky was "bluish."

According to Victim, when appellant entered the room, Victim was lying flat on his stomach with his head turned facing the wall, pretending to be asleep. Victim heard a man's voice whispering something to him, but could not understand what was being said. During this time, Victim could hear Mother in the kitchen. Victim testified that while appellant was watching a television show called "Girls Gone Wild," appellant repeatedly reached under Victim and squeezed Victim's penis over the baggy silk-like shorts Victim was wearing. Victim moved his head back and forth and squinted his eyes a little so he could see the person touching him. Mother stated she entered the room approximately five times while appellant was in it. One of the times, Mother told appellant to leave the door open after he had closed the door. Another time, Mother was concerned because it looked like appellant was pretending to be asleep. Victim testified that once or twice appellant left and reentered the room. Victim stated the molestation occurred over the course of 10 or 15 minutes, and he did not say anything when appellant touched him because he was scared.

According to Mother, it was just getting light, sometime between 4:00 and 5:00 a.m., when she asked appellant to leave her room because she wanted to go to bed. Appellant complied with the request. Sometime after appellant left, Victim told Mother what appellant had done. Victim stated he spoke with Mother immediately after appellant left for the last time and Mother entered the room. Mother, in contrast, testified that Victim was asleep when she lay down in bed next to him and that she was awake for a couple of hours with the television turned onto the cartoon channel. She said she had just dozed off when Victim woke up sometime between 5:00 and 6:00 a.m. When Victim

woke up, Mother could tell something was wrong. At first Victim did not want to say what had occurred because he was scared, but then he eventually told her the man who was in the room had touched him.

Upon learning what had transpired, Mother became angry and went out to confront appellant and inform the house manager, B.L., about the molestation. Appellant was still at the house when Mother started to tell B.L. about what had happened, but left the house while she and B.L. were talking.

Shortly thereafter, Mother and Victim went to the home of Victim's father (Father) where they called the police. Wilkie was dispatched to Father's house at approximately 7:40 a.m. on August 20, 2006, and spoke with Father and with Victim, who told Wilkie about the molestation. Wilkie later went to Mother's residence and spoke with Mother, B.L., and some of the other residents of the house.

Wilkie prepared a photographic lineup and went to Father's home to show it to Victim. Victim identified appellant and stated he was 100 percent sure that appellant was the person who molested him.

The following day, August 21, 2006, Wilkie showed Mother the photographic lineup. Mother identified appellant as the person who had been in the room with her son.

Before trial, the prosecution filed a motion in limine under Evidence Code section 1108[3] to introduce evidence of two prior acts of sexual misconduct committed by appellant. In 2000, appellant visited a residence where there were two boys, aged 11 and 12, and fondled the boys' penises. In 2004, appellant provided a 20-year-old male with methamphetamine and then fondled and orally copulated him. The court tentatively ruled that evidence of the 2000 misconduct would be admissible.

The prosecution, however, rested without introducing evidence of appellant's 2000 misconduct. The prosecutor subsequently explained, outside the presence of the jury, that after he heard Victim testify he decided to focus the jury's attention on Victim's testimony and not call any witness from the 2000 incident.

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3 All further undesignated section references are to the Evidence Code.

The Defense

Although the defense sought B.L. as a witness, the trial court ruled he was unavailable as one. Wilkie testified B.L. was six feet tall, weighed 250 pounds, and had black hair.[4] B.L. also admitted to Wilkie that he was present at the house where the molestation occurred on August 19 and 20, 2006.

DISCUSSION

I. *The Trial Court Did Not Err by Excluding Evidence that B.L. Is a Registered Sex Offender*

Appellant's defense was that someone else molested Victim. To support his third party culpability theory, appellant sought to introduce evidence that B.L. was present at Mother's home on August 19 and 20 and is a registered sex offender under Penal Code section 290.[5] The prosecutor objected on the grounds the evidence was not relevant. After hearing argument from counsel outside the presence of the jury, the trial court stated that evidence establishing B.L. was at Mother's home at the time the molestation occurred and had a similar build as appellant was relevant. The trial court further held that evidence of B.L.'s status as a registered sex offender was excludable under section 352 as unduly prejudicial and time consuming. The undue consumption of time would result in part from the prosecutor calling witnesses to appellant's 2000 sexual offense in response to evidence of B.L.'s sex offender status.

Appellant contends the trial court erred in excluding evidence that B.L. is a registered sex offender because B.L.'s prior misconduct was relevant to appellant's third party culpability defense. Appellant further argues this error resulted in a miscarriage of justice and denied him a fair trial. We conclude there was no error.

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[4] Wilkie testified the perpetrator was a white male, approximately six feet tall, around 250 pounds, with collar length or shorter blond hair. In closing argument, defense counsel pointed out that B.L.'s physical description is similar to that of the perpetrator, and contended that in a dark room it would be difficult to distinguish two similar-looking people.

[5] Penal Code section 290 requires the registration of persons convicted of sex offenses.

"A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his or her own guilt." (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 264.) "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*).) "This does not mean, however, that no reasonable limits apply. Evidence that another person had 'motive or opportunity' to commit the charged crime, or had some 'remote' connection to the victim or crime scene, is not sufficient to raise the requisite reasonable doubt. [Citation] Under *Hall* and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 43.) Once the court finds the proffered evidence raises a reasonable doubt as to the defendant's guilt, "courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible (§ 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. (§ 352)." (*Hall*, at p. 834; accord, *People v. Harris* (2005) 37 Cal.4th 310, 340.)

Evidence of B.L.'s status as a registered sex offender implicates section 1101. Section 1101, subdivision (a), states the basic prohibition against admission of character evidence, whether in the form of an opinion, reputation, or specific instances of misconduct, to prove the character or propensity of a person to commit a crime. (See *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) However, when the purpose of introducing evidence of other crimes is not to show bad character or disposition to commit a crime, but instead is relevant to prove identity, opportunity, intent, or common design, method, scheme, or plan, the evidence may be admissible for that particular limited purpose. (§ 1101, subd. (b); see *People v. Quartermain* (1997) 16 Cal.4th 600, 626-627.) This analysis also applies to "proposed evidence regarding prior criminal conduct of a third party alleged to have committed the charged offense." (*People v. Davis* (1995) 10 Cal.4th 463, 501 (*Davis*).) Evidence that does not "show a fact other than the third party's criminal disposition, such as motive or intent," but rather only that

the third party is more likely the perpetrator because of his criminal history "does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*) Further, "[e]vidence that a third person actually committed a crime for which the defendant has been charged is relevant but, like all evidence, subject to exclusion at the court's discretion under . . . section 352 if its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 140.)

Appellant relies on *People v. Cudjo* (1993) 6 Cal.4th 585 (*Cudjo*) and *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998 (*Vorse*) to argue the trial court improperly usurped the jury's role in assessing the credibility of the proffered evidence. In *Cudjo*, our Supreme Court held the trial court abused its discretion by invading the province of the jury when it excluded third party culpability evidence under section 352 on the basis that the testifying witness was not credible. (*Cudjo*, *supra*, at pp. 609-610.) In *Vorse*, the trial court determined that a witness was not credible and, relying on section 352, struck that witness's testimony and refused to allow him to testify further. (*Vorse*, at p. 1007.) Division Three of this court found the trial court abused its discretion because under the circumstances presented, an evaluation of the witness's credibility was not a proper component of section 352's balancing test. (*Vorse*, at p. 1013.)

Cudjo and *Vorse* are inapposite. The record does not support appellant's suggestion the trial court excluded evidence of B.L.'s status as a registered sex offender because it lacked credibility. Rather, the trial court excluded this evidence because it was unduly prejudicial, inflammatory, and time consuming.

Appellant also cites *People v. Jackson* (1991) 235 Cal.App.3d 1670 (*Jackson*). In *Jackson*, the defendant and the victim attended a dance. A dispute arose and the victim was shot twice. (*Jackson*, at p. 1674.) The defense theory was that even though defendant was armed, an individual named Tolbert was the shooter. (*Id.* at p. 1675.) Defendant sought to introduce evidence that Tolbert, since deceased, admitted to firing shots at the victim. (*Id.* at p. 1677.) The trial court excluded the evidence under section 352 finding it to be more prejudicial than probative. (*Jackson*, at p. 1678.) Division Four

of this court found the evidence was highly probative and that the trial court erred in excluding the evidence as prejudicial. (*Id.* at p. 1679.) In support of his argument, appellant quotes a portion of the opinion, " '[A] defendant's due process right to a fair trial requires that evidence, the probative value of which is *stronger* than the *slight-relevancy* category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution.' " (*Ibid.*, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 552 (*Reeder*).)

Insofar as appellant relies on the quotation to suggest his due process rights require the introduction of "more than slightly relevant" evidence under all circumstances, we are not persuaded. *Reeder*, the case which *Jackson* was quoting for the proposition appellant relies upon, went on to say that "[w]e do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using . . . section 352." (*Reeder, supra*, 82 Cal.App.3d at p. 553; accord, *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 450.) This principle was discussed in *Hall*. There, the defendant contended that his constitutional right to present a defense precluded any application of section 352 to third party culpability evidence. (*Hall, supra*, 41 Cal.3d at p. 834.) The *Hall* court rejected that argument, stating that "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*Ibid.*) Because we find appellant's due process rights do not prohibit application of section 352, we turn to whether the trial court abused its discretion in excluding the proffered evidence under that statute.

"Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 724 (*Waidla*).) Under section 352, "the trial court enjoys broad discretion in assessing whether the

probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The court's "exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*Id.* at pp. 1124-1125.) We conclude the trial court did not abuse its discretion in excluding the evidence of B.L.'s status as a registered sex offender.

In arguing for the admissibility of the proffered evidence, defense counsel made a passing reference to the fact he had recently learned B.L.'s registration requirement was due to a prior conviction for indecent liberties with a minor. However, counsel did not argue for admission of the conviction itself, nor did he further discuss the nature of the sexual offense that led to the registration requirement. Instead, counsel stated he only intended to elicit from Wilkie a statement B.L. made during the investigation that B.L. is a registered sex offender. Simply establishing that B.L. was required to register could have no more than minimal relevance. Appellant attempts to bolster the probative value of the registration evidence by arguing that B.L. was the house manager at the time of the molestation and had the "same, if not better, opportunity" as appellant to commit the offense. Appellant relies on Victim's testimony that the molestation occurred just before dawn and evidence that appellant had left the room at the latest at 5:00 a.m. Therefore, according to appellant "the molest did not occur until ***after*** [Mother] asked appellant to leave the room, and ***after*** appellant had done so." (Boldface type and italics in original.) Appellant also maintains Victim testified the molestation took place *while* Mother was in the room. Appellant further argues that the jury was not required to accept the Victim's identification of the perpetrator, but rather could have believed that B.L. had snuck into Mother's room just before dawn and molested Victim.

Even assuming this raises the probative value of the proffered evidence, the undue prejudice that would result substantially outweighs it. The statute uses the word "prejudice" "in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Farmer* (1989) 47 Cal.3d 888, 912 (*Farmer*), overruled

on another ground in *Waidla, supra,* 22 Cal.4th at p. 724, fn. 6.) Prejudicial evidence " 'uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]' " (*People v. Heard* (2003) 31 Cal.4th 946, 976.) Here, evidence that B.L. is a registered sex offender is the type of inflammatory evidence that would cause jurors to have an emotional bias against B.L. and unduly prejudice the prosecution's case. Accordingly, the trial court did not abuse its discretion in excluding the evidence under section 352.

Moreover, appellant does not address the trial court's ruling that evidence of B.L.'s status as a Penal Code section 290 registrant would have led to an undue consumption of time. The court determined that if B.L.'s status were presented, the prosecution would have introduced evidence of appellant's 2000 sexual offense. Although evidence that B.L. is a registered sex offender would not have required much time, presentation of appellant's prior misconduct under section 1108 would have led to a mini-trial of the events that occurred in 2000.

In conclusion, we find the trial court did not abuse its discretion in concluding that the proffered evidence was inadmissible.

II. *The Trial Court Properly Denied the Motion for a New Trial*

On appeal appellant maintains the facts leading to B.L.'s prior conviction—which were learned after trial—warranted a new trial, and the trial court erred in its evaluation of the admissibility of those facts.[6] During appellant's motion for a new trial, appellant produced police reports regarding B.L.'s prior conviction that resulted in his requirement

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[6] This contention differs somewhat from the arguments presented to the trial court, which included the claim that trial counsel rendered ineffective assistance for failing to investigate and present evidence of B.L.'s prior conviction. Although appellant arguably forfeited his current argument by failing to raise it in the trial court, we will consider it to forestall a claim counsel was ineffective for not predicating the motion for a new trial on this ground. (See *People v. Turner* (1990) 50 Cal.3d 668, 708 [considering argument that prosecution failed to give adequate notice before introducing aggravating evidence at the penalty phase to avoid a later claim of ineffective assistance of counsel]; *People v. Lewis* (1990) 50 Cal.3d 262, 282 [considering claim of prosecutorial misconduct not objected to in trial court to forestall a claim of ineffective assistance of counsel].)

to register under Penal Code section 290. According to those reports, B.L. sexually molested his former sister-in-law on numerous occasions beginning in February or March 1978, when the victim was 12 years old, until 1983. The molestation began one night when the victim had gone to her sister's apartment to spend the night. After the victim's sister went to bed, B.L. joined the victim in the living room and began rubbing the victim's back, took off her pajamas and orally copulated her, and then had sexual intercourse with her twice. In 1993, B.L. was convicted by a jury in another state for indecent liberties with a minor. The reason cited by the trial court in denying the motion for a new trial was that the details regarding B.L.'s prior conviction would have been excluded under section 352, and therefore trial counsel was not ineffective for failing to obtain and present this evidence.

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citation.]" (*Davis, supra*, 10 Cal.4th at p. 524.) We conclude the trial court did not abuse its discretion in denying the motion for a new trial.

Penal Code section 1181 provides nine statutory grounds for which a new trial may be granted. Although the statute states the enumerated grounds are exclusive, "new trials are frequently granted on nonstatutory grounds 'where the failure to do so would result in a denial of a fair trial to a defendant in a criminal case.' [Citation.] The duty of a trial court to afford every defendant in a criminal case a fair and impartial trial is of constitutional dimension. Where the procedure has fallen short of that standard, an accused has been denied due process, and the inherent power of the court to correct matters by granting a new trial transcends statutory limitations [citation]." (*People v. Oliver* (1975) 46 Cal.App.3d 747, 751.)

Appellant relies on both statutory and nonstatutory grounds to support his claim. He cites Penal Code section 1181, subdivisions 5[7] and 8[8] as well as decisions holding that courts have inherent authority to grant a new trial when a defendant's due process rights are implicated. He contends evidence regarding B.L.'s prior conviction was relevant to his third party culpability theory, and therefore the trial court erroneously concluded that evidence was inadmissible. He further maintains the failure to present this evidence to the jury deprived him of a fair trial. We find his arguments lack merit.

Under Penal Code section 1181, subdivision 5, a trial court may grant a motion for a new trial if it "erred in the decision of any question of law arising during the course of the trial." We are not persuaded that the trial court erred in its evaluation of the admissibility of the factual circumstances leading to B.L.'s prior conviction. B.L.'s prior misconduct involved multiple molestations of the sister of a woman he had been dating and eventually married. The misconduct continued over a five-year period, and the physical acts included oral copulation and sexual intercourse. The offense in the instant case, on the other hand, was quite dissimilar: a one-time inappropriate touching of Victim, a boy who was unrelated to B.L., which consisted of fondling Victim over his clothing. Both victims were approximately the same age. But the lack of similarity of the crimes coupled with the undue prejudice that would flow from admission of the out-

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7 Penal Code section 1181, subdivision 5, provides for a new trial "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury."

8 Penal Code section 1181, subdivision 8, authorizes a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable."

of-state offense leads us to conclude that the trial court's decision that the evidence would have been excluded under section 352 was not an abuse of discretion.

Appellant's reliance on Penal Code section 1181, subdivision 8, fares no better. Under that provision, "a court may grant a new trial when new evidence is discovered that is material to the defendant's case and that he could not with reasonable diligence have discovered and produced at trial. Several factors must be considered by the court: the evidence itself, not merely its materiality, must be newly discovered; the new evidence may not be cumulative; and it must render a different outcome probable." (*Farmer, supra*, 47 Cal.3d at p. 917; see *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

We initially note that appellant does not demonstrate how the details regarding B.L.'s prior conviction satisfy the standards under Penal Code section 1181, subdivision 8, and we find appellant cannot make such a showing. Here, the record reveals there is no basis for concluding the details of B.L.'s prior conviction could not with reasonable diligence have been discovered earlier. Indeed, counsel's failure to uncover this information formed the basis of appellant's ineffective assistance of counsel claim in the trial court and in the instant appeal. More significantly, as discussed above, we agree with the trial court's conclusion that the evidence would have been properly excluded under section 352. Thus, the evidence does not "render a different outcome probable." (*Farmer, supra*, 47 Cal.3d at p. 917.)

Appellant contends the failure to introduce evidence of B.L.'s prior conviction deprived him of his due process right to a fair and impartial trial. We disagree. The inadmissibility of this evidence undermines his claim.

In conclusion, we find the trial court did not abuse its discretion by failing to order a new trial to allow appellant to present the factual circumstances leading to B.L.'s prior conviction.

III. *Ineffective Assistance of Counsel*

Alternatively, appellant argues his trial counsel was ineffective for failing to investigate B.L.'s prior out-of-state conviction and present this evidence in support of appellant's third party culpability defense. To prevail on a claim of ineffective assistance

of counsel, "a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Id.* at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Ibid.*)

We discern no prejudice to appellant resulting from his trial counsel's failure to obtain evidence regarding the factual basis for B.L.'s prior conviction. As we discussed in part II., above, the circumstances leading to B.L.'s conviction for indecent liberties with a minor would have been properly excluded under section 352. Accordingly, appellant's claim of ineffective assistance of counsel lacks merit.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.